# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>December 8, 2000 |
| v | No. 222110<br>Wayne Circuit Court |
| JOHN MORGAN,<br><br>Defendant-Appellee. | LC No. 95-002557 |

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion to dismiss this case with prejudice. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On February 6, 1995 defendant was charged with false pretenses over $100, MCL 750.219; MSA 28.416, and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The district court's register of actions indicated that defendant was incarcerated in the Jackson County Jail, but did not indicate the reason for his incarceration. He waived preliminary examination, and was bound over for trial. On March 6, 1995, defendant failed to appear for arraignment on the information, and a capias was issued for his arrest.

By letter dated May 29, 1999, and addressed to the Wayne County Clerk, defendant stated that the Department of Corrections (DOC), where he had been incarcerated since March 1995, had discovered the existence of the outstanding Wayne County charges. Subsequently, defendant moved to dismiss the charges based on a violation of the 180-day rule. The trial court granted the motion, finding that the prosecution knew or should have known that defendant was a state inmate. In addition, the trial court found that defendant was entitled to dismissal with prejudice because his right to a speedy trial had been violated. MCR 6.004(D)(2).

The 180-day rule, MCL 780.131(1); MSA 28.969(1)(1), provides that a person incarcerated in a state facility or detained in a local facility awaiting incarceration in a state facility must be brought to trial within 180 days after either the prosecution has actual knowledge

* Circuit judge, sitting on the Court of Appeals by assignment.

of the existence of an untried charge against him, or the DOC knows or has reason to know that a criminal charge is pending against the person. MCR 6.004(D)(1). Trial need not actually commence within 180 days. If the prosecution takes good faith action within that period and proceeds promptly to prepare the case for trial, the rule is satisfied. MCR 6.004(D)(2); *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). The burden is on the prosecution to justify the delay. *People v Wolak*, 153 Mich App 60, 64; 395 NW2d 240 (1986).

To determine whether a defendant has been denied the constitutional right to a speedy trial, the following factors must be balanced: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) any prejudice to the defendant. A delay of more than eighteen months is presumed to be prejudicial to the defendant, and the prosecution has the burden of proving lack of prejudice. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Simpson*, 207 Mich App 560, 563; 526 NW2d 33 (1994). We review the trial court's findings of fact for clear error, and the ultimate decision de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

Plaintiff argues that the trial court erred by granting defendant's motion and dismissing the case with prejudice. We agree, reverse the trial court's order, and remand for further proceedings. The trial court erroneously found that the prosecution knew or should have known that defendant was detained in a local facility awaiting incarceration in a state facility as of February 21, 1995, and that the prosecution should have known that defendant was in fact incarcerated in a state facility after March 1, 1995. To trigger application of the 180-day rule, the prosecution must have actual knowledge of the existence of an untried charge against a state prisoner, or one awaiting transfer to a state prison. *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998). After the DOC learned of the existence of the untried charge against defendant, it did not request final disposition of the charge as required by MCL 780.131(1); MSA 28.969(1)(1). The 180-day rule did not require dismissal under the circumstances. Defendant was entitled to sentence credit for the period of delay rather than dismissal. MCR 6.004(D)(2).

Furthermore, we conclude that the trial court erred by granting the motion to dismiss on the ground that defendant was denied the constitutional right to a speedy trial. The length of the delay was presumptively prejudicial. *Simpson*, *supra*. The reason for the delay, the prosecution's lack of actual knowledge that defendant was incarcerated in a state facility, cannot be attributed to defendant; however, the delay was not directly caused by the prosecution. Nothing indicates that defendant asserted his right to a speedy trial at any time. Finally, the trial court's finding that defendant would likely be prejudiced if he were tried after such a lengthy delay is not supported by the record. Defendant was incarcerated for another, unrelated conviction. His loss of liberty was not due to the failure to promptly dispose of the charges against him in this case. In addition, any claim that the delay caused the fading of memories, etc., a claim not made here, is insufficient to establish the denial of the right to a speedy trial. *Gilmore*, *supra*, 461-462. The trial court's finding that defendant was prejudiced by the delay was clearly erroneous. *Id.*, 459. Dismissal of the case constituted error.

The trial court's order dismissing the case with prejudice is reversed, and this matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Dennis B. Leiber